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BRACELETS AND BOOBIES: *B.H. v. EASTON AREA SCHOOL DISTRICT* AND THE NEED FOR A NEW UNIFORM TEST IN STUDENT SPEECH CASES

*Sheldon McCurry Stokes**

I. INTRODUCTION

"I'm sure you have seen those colorful rubber bracelets" that are stamped with the words "i ♥ boobies!"[1] "Cute. Harmless. They may induce a titter (no pun intended). But certainly [they are] not lewd and obscene."[2]

What is it about the word "boobies" that tends to make a crowd blush or giggle? "Boobies," is a mere synonym of the word "breasts," a term commonly used in many educational and professional settings. Whatever "it" is, the uncomfortable, but measurable, public reaction to words such as "boobies" or "ta tas" prompted breast cancer groups to use the word as an attention-grabbing tool to reach audiences with a more playful sense of humor. One such group is The Keep A Breast Foundation, an organization dedicated to breast cancer awareness, who prides itself in its creative programs to promote knowledge and raise funds for research. The "i ♥ boobies!" campaign has been received by some with open arms and others with great dismay. Critics are particularly concerned about young students participating in the campaign and the effect of their involvement in the classroom. The

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1. Stephen Terrell, *Boobies Bracelet and First Amendment: Case Headed to Supreme Court?* LAW FOR WRITERS (Apr. 8, 2015, 8:24 AM), http://lawforwriters.blogspot.com/2013/11/boobies-bracelets-and-first-amendment.html.

2. *Id.*; *I ♥ Boobies!*, KEEP–A–BREAST.ORG, http://www.keep-a-breast.org/programs/i-love-boobies/ (last visited Apr. 8, 2015).

controversy demonstrates how the use of the word "boobies" can impact both the educational and legal communities.

The Keep A Breast Foundation is a nonprofit organization committed to eradicating breast cancer.[3] The foundation's mission is to provide "support programs for young people impacted by cancer and educate people about prevention, early detection, and cancer–causing toxins . . . ."[4] The foundation's most popular program is its "i ♥ boobies!" campaign[5] which "encourages young people to be open and active about breast cancer prevention."[6] To participate in the campaign, young people wear the foundation's "i ♥ boobies" bracelets and t-shirts[7] in an effort to spark conversations about breast cancer.[8]

In 2010, B.H. and K.M., two girls ages twelve and thirteen, wore their "i ♥ boobies!" bracelets to their public school.[9] The school suspended the two girls after determining that the bracelets were both disruptive and vulgar.[10] In response, the girls teamed with the American Civil Liberties Union and brought suit against their school district alleging that the school infringed on their First Amendment freedom of speech. In 2011, the girls won their case in federal district court.[11] On appeal, the Third Circuit Court of Appeals affirmed the district court's

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3. *Mission*, Keep–A–Breast.org, http://www.keep-a-breast.org/about/mission/ (last visited Feb. 7, 2015) (marketing the Keep A Breast Foundation as "the leading youth–focused, global nonprofit breast cancer organization").

4. *Id.*

5. *I ♥ Boobies!*, KEEP–A–BREAST.ORG, http://www.keep-a-breast.org/programs/i-love-boobies/ (last visited Apr. 8, 2015) (stating that "i ♥ boobies!" is KAB's (Keep A Breast's) signature breast cancer outreach program).

6. The purpose of the "i ♥ boobies!" campaign is "to remove the shame associated with breasts and breast health, and [its] message represents [the foundation's] positive approach to breast cancer dialogue." *Id.*

7. Merchandise revenue goes towards breast cancer research studies and Keep A Breast states on its website that they "are constantly developing new ways to spread the message among all types of people. Our iconic bracelets are only the beginning." *Id.*

8. *Id.*

9. *KAB Story*, Keep-A-Breast.org, http://keep-a-breast.org/about/kab-story (last visited Feb. 8, 2015); *See* B.H. v. Easton Area Sch. Dist., 725 F.3d 293, 298–300 (3d Cir. 2013).

10. *See* B.H. v. Easton Area Sch. Dist., 827 F. Supp. 2d 392 (E.D. Pa. 2011).

11. *KAB Story*, Keep-A-Breast.org, http://keep-a-breast.org/about/kab-story (last visited Feb. 8, 2015).

decision, holding that the bracelets could not be banned because they were a protected form of speech under the First Amendment.[12]

Recently, the Supreme Court denied the school district's petition for certiorari, suppressing modern student speech issues for another court.[13] This Note argues that the Court's decision not to grant certiorari in *B.H.* was a mistake for two reasons. First, current doctrine is unresponsive to modern student speech issues, and second, there is an absence of a structured uniform test in existing law. The Supreme Court began to construct the student speech doctrine through a string of cases beginning, predominantly with, *Tinker v. Des Moines Independent Community School District* (*Tinker*).[14] *Tinker* created the foundation for the student speech doctrine and became the hallmark Supreme Court case for analyzing the First Amendment rights of students to free speech.[15] *Tinker* has since become dated and subsequent cases such as *Bethel School District Number 403 v. Fraser*,[16] as well as *Hazelwood School District v. Kulmeier*[17] and *Morse v. Frederick*[18] have only fragmented *Tinker* failing to unify the student speech doctrine. As a result, lower courts have struggled to apply the student speech doctrine to recent cases creating the juxtaposition of the outcomes of *B.H.* and *J.A. v. Fort Wayne Community School* (*J.A.*).[19] These cases represent almost identical fact patterns, with contradictory conclusions.[20] Therefore, granting certiorari in *B.H.* would have allowed the Court the opportunity to address the many issues that have evolved under these cases.

This Note argues that a new test—one that can be uniformly applied to address modern issues—should be developed by the Supreme Court to prevent arbitrary lower court decisions concerning student speech. Part II provides an overview of the Court's contemporary construction of the student speech doctrine by analyzing the landmark decisions in *Tinker* and *Fraser* followed by an analysis of the Court's

12. *See B.H.* 725 F.3d at 298–300 (3d Cir. 2013).

13. *See* Easton Area Sch. Dist. v. B.H., No. 13–672, 2014 U.S. LEXIS 1839.

14. 393 U.S. 503 (1969); *see also infra* Part II.B (analyzing *Tinker*).

15. *Id.*

16. 478 U.S. 675 (1986); *see also infra* Part II.C (analyzing *Fraser*).

17. 484 U.S. 260 (1988); *see also infra* Part II.D (analyzing *Kulmeier*).

18. 551 U.S. 393 (2007); *see also infra* Part II.D (analyzing *Morse*).

19. *See infra* Part IV.B; No. 1:12–CV–155 JVB, 2013 U.S. Dist. LEXIS 117667 (N.D. Ind. Aug. 20, 2013).

20. *See infra* Part IV.

more recent additions, *Kulmeier* and *Morse*. Part III addresses the existing criticisms of the current student speech doctrine, noting that academics have pushed for reform of the existing test. Part IV then uses the facts of *B.H.* and *J.A.* to illustrate the disparate outcomes in lower courts under the existing law. Finally, Part V proposes a uniform student speech test, how courts should apply it, and why it will reduce confusion among lower courts, public school administrators, parents and students in an increasingly inter-connected, technology driven 21st century American society.

II. THE STUDENT SPEECH DOCTRINE

A. The Foundation of the Student Speech Doctrine

The First Amendment of the United States Constitution provides that "Congress shall make no law...abridging the freedom of speech."[21] "The right to freedom of speech allows individuals to express themselves without interference or constraint by the government."[22] The Supreme Court establishes that the government must "provide substantial justification for the interference with the right of free speech [when it seeks to regulate] the content of the speech."[23] Freedom of speech carries with it the question of whether students enrolled in state funded public schools can exercise their freedom of speech without interference or restraint by the government.[24]

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21. U.S. CONST., amend. I; *See* U.S. CONST., amend. XIV (allowing for the incorporation of the First Amendment's Bill of Rights to apply to citizens of individual states, including the right to freedom of speech); Gitlow v. New York, 268 U.S. 652 (1925) (establishing that state governments were bound to the First Amendment's freedom of speech).

22. *First Amendment: An Overview*, LEGAL INFORMATION INSTITUTE, *First Amendment: An Overview*, www.law.cornell.edu/wex/first_amendment (last visited March 3, 2015).

23. *Id.*

24. *See* U.S. CONST., amend. I.

Still, for most of American history "public school students had no First Amendment rights."[25] Rather, student speech was judged by "[a] rule of 'reasonableness'" which allowed public school administrators to regulate student speech and punish students for certain speech "[as] long as a school rule was not arbitrary and completely unreasonable."[26] Then, in the throws of the Vietnam War, the Court decided *Tinker v. De Moines*, where the Court held for the first time that students were entitled to protection under the First Amendment's freedom of speech clause,[27] paving the way for broader constitutional rights for students in public schools.

B. Tinker v. Des Moines Independent Community School District

In *Tinker*, three students, John F. Tinker (age fifteen), Christopher Eckhardt (age sixteen), and Mary Beth Tinker (age thirteen) made the voluntary choice to wear black armbands to their school as a protest of the Vietnam War.[28] When school administrators learned of the students' plan they quickly implemented a new policy: "any student wearing an armband to school would be asked to remove it, and if he refused he would be suspended until he returned without the armband."[29] Notwithstanding the policy, the three students wore their armbands to school, were suspended, and were told that they would remain suspended "until they would come back without their armbands."[30] The students challenged their suspension in court seeking to enjoin school officials from disciplining them under the policy.[31] The United States District Court for the Southern District of Iowa dismissed the complaint, holding that the armbands were disruptive and that the school had a right to prevent disruption or unwanted speech.[32] On appeal, the Eighth Circuit

25. David L. Hudson Jr., *Government as an Educator: Public School Student Speech Law*, 7 LEGAL ALMANAC: THE FIRST AMENDMENT FREEDOM OF SPEECH §7.2 (2012).

26. *Id.*

27. *See* Tinker v. Des Moines Indep. Cmty Sch. Dist., 393 U.S. 503, 504–05 (1969).

28. *Id.* at 504.

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.* at 504–05.

affirmed the District Court's ruling[33] and the Supreme Court granted certiorari to resolve the dispute.[34]

In a landmark decision, the Supreme Court overturned both lower courts and ruled in favor of the students. Writing for the majority, Justice Fortas famously stated that "[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[35] As Justice Fortas explained:

> In our system, state-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students. Students in school as well as out of school are "persons" under our Constitution. They are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State. In our system, students may not be regarded as close-circuit recipients of only that which the State chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved. In the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views.[36]

The Court further noted that "schools could restrict such speech only where the speech reasonably foreseeably could have resulted in substantial indiscipline, disruption, disturbance, or disorder, or where the speech would have violated the more or less specified rights of other students or of unspecified non-students."[37] Based on the record presented the Court reasoned that no classrooms were disrupted and that the armbands did not cause "threats or acts of violence on school

33. Tinker v. Des Moines Indep. Cmty Sch. Dist., 393 U.S. 503, 504–05 (1969).

34. *Id.*

35. *Id.* at 506.

36. *Id.* at 511.

37. R. George Wright, *Article: Post–*Tinker, 10 STAN. J.C.R. & C.L. 1, 2 (2014); *see also Tinker*, 393 U.S. at 514.

premises."[38] Rather, the Supreme Court determined that the "wearing of armbands in the circumstances of this case was entirely divorced from" any form of disruptive conduct or any potential for disruptive speech.[39] In fact, the wearing of the armbands "was closely akin to 'pure speech'" and the protection of "pure speech" had always been recognized under the First Amendment.[40] Therefore, the Court concluded that the school district's policy limited the student's first amendment speech rights and the armbands were protected by the constitution.

Tinker is important for two reasons. First, *Tinker* recognized that students do not shed all of their constitutional rights at the school gate.[41] *Tinker* established that students are entitled to express themselves through speech within the confines of their schools and administrators must respect this right as long as speech is not "disruptive".[42] Second, unlike the previous "rule of reasonableness,"[43] students were no longer seen solely as minors under the complete and total dominion of parents and school officials, but as individuals with freedom to express themselves accordingly. While *Tinker* provides a broad recognition of a student's right to freedom of speech, as Part III.C details, *Tinker's* provisions are not boundless and certain exceptions to the doctrine are necessarily required for administrative supervision of minors.

C. Bethel School District v. Fraser

The next significant addition to the student speech doctrine did not occur until almost twenty years later in *Bethel School District v. Fraser*.[44] In *Fraser*, a high school student delivered a speech to the student body, nominating a fellow classmate for office in the student government.[45] "During the entire speech, Fraser referred to his candidate

38. *Tinker*, 393 U.S. at 508.

39. *Id.* at 505–06.

40. *Id.* (citing Cox v. Louisiana, 379 U.S. 536, 555 (1965); Adderley v. Florida, 385 U.S. 39 (1966)).

41. *Tinker*, 393 U.S. at 506 ("It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.").

42. *Id.*

43. Hudson Jr., *supra* note 25.

44. 478 U.S. 675 (1986).

45. *Id.* at 677.

in terms of an elaborate, graphic, and explicit sexual metaphor."[46] Prior to delivering the speech, two teachers warned the student that they believed the speech was "inappropriate" and that delivering the speech could result in "severe consequences" by the administration.[47] After delivering the speech, the student was suspended by his high school principal.[48] In response, the student brought suit, alleging that the school district had violated his right to freedom of speech under *Tinker*.[49]

Unlike *Tinker*, the Court ruled in favor of the school district, holding that the First Amendment did not prevent a school administration from disallowing "vulgar and lewd speech" that "would undermine the school's basic educational mission."[50] As a result, the Court determined that the "[s]chool [d]istrict acted entirely within its permissible authority."[51] Moreover, "*Fraser* symbolized a narrowing of the *Tinker* rule and that there were certain forms of student speech that could be restricted if it reached this tipping point of being categorized as "vulgar speech and lewd conduct."[52] Thus, where *Tinker* established a broad right of student speech within public schools, *Fraser* illustrated that certain exceptions would naturally have to co-exist with this right given the substantial duties required by administrators serving *in loco parentis* of minors in public schools. As Part II.D explains, *Fraser* is not the only limiting principle carved out of the student speech doctrine.

D. Hazelwood School District v. Kulmeier and Morse v. Frederick

Just two years after *Fraser*, the Court again ruled in favor of school administrators in *Hazelwood v. Kuhlemeier*, where the Court addressed whether a student published newspaper was subject to regulation by school officials under the First Amendment.[53] In *Kuhlemeier*, student editors wanted to publish two articles in the student produced newspaper and the administration objected because of the

46. *Id.* at 677–78.
47. *Id.* at 678.
48. *Id.*
49. *Id.* at 679.
50. *Id.* at 685–86.
51. *Id.*
52. *Id.* at 685.
53. Hazelwood Sch. Dist. v. Kulmeier, 484 U.S. 260 (1988).

content of the articles.[54] One article dealt with students' experiences with pregnancy and the other article spoke about "the impact of divorce on students at the school."[55] The school administrator chose to remove the two articles from the publication because of the content.[56] Relying on *Fraser,* the Court held that the administrator had a right to prevent publication of articles that he deemed to be reasonably offensive and that in doing so he did not violate any First Amendment rights to free student speech protected by *Tinker.*[57] Moreover, the Court noted that because the school newspaper was sponsored by the school, administrators should be "entitled to exercise greater control" over this particular type of speech.[58] Thus, *Kulmeier* bolstered *Fraser*'s notion that student speech rights are not boundless and adds an additional exception to the doctrine for student published newspapers.

Like *Kulmeier*, *Morse v. Frederick* adds yet another limitation to the student speech doctrine created in *Tinker.* In *Morse*, a group of students displayed a banner that read: "BONG HiTS 4 JESUS," during a school social event.[59] The school administrator demanded the banner be taken down and suspended one of the students who refused to comply with her order.[60] The administrator argued that the banner was inappropriate because it promoted illegal drug use and that she had a reasonable need to regulate this form of student speech.[61] Again, the Supreme Court sided with school administration, holding that forced removal of the banner and suspension of a noncompliant student was within her discretion.[62] The Supreme Court used a very similar rationale that it adopted in *Fraser* and *Kulmeier* in that certain types of speech, especially those that are inappropriate and offensive, can often be regulated by the school administration. Thus, the Court carved out another exception to the doctrine by explaining that student speech

54. *See id.* at 263.
55. *Id.*
56. *Id.*
57. *See* Hazelwood Sch. Dist. v. Kulmeier, 484 U.S. 260, 273 (1988).
58. *Id.* at 271.
59. Morse v. Frederick, 551 U.S. 393 (2007).
60. *Id.* at 398.
61. *Id.* at 401.
62. *Id.* at 403.

promoting illegal drug use was inappropriate and therefore should have been limited by the school administration.[63]

In sum, the Supreme Court has recognized over the past 60 years that students have a constitutional right to speech while attending school. *Tinker* holds that students are allowed to express themselves within the walls of public schools and that administrators must provide substantial justification for regulating the speech of students.[64] Conversely, *Fraser, Kuhlmeier* and *Morse* place firm limiting principles on a student's right to free speech if the speech is "lewd" or "vulgar" in nature, occurs in the context of a student produced school newspaper, or promotes illegal drug activity.[65] The student speech doctrine is composed primarily by the combination of the doctrines created in *Tinker* and *Fraser*. All in all, these four Supreme Court cases are vital to the current understanding of the student speech doctrine. Still, it is this compilation of rules and exceptions from *Tinker*, *Fraser*, *Kulmeier*, and *Morse* that have prompted criticism.

III. CRITICISMS OF THE STUDENT SPEECH DOCTRINE

As Part II explained, the holding in *Tinker* has been subject to numerous exceptions. As a result, the current state of the doctrine is rigid to very specific fact patterns and is difficult to apply in a uniform manner to future cases. The student speech doctrine, as it is formulated now, is also not as progressive as it could be. With rapid changes in modern society, the Supreme Court needs a student speech doctrine that is equipped to handle modern issues.

A. The Doctrine Must be Applicable to Modern Issues

The current student speech doctrine has not proven applicable to modern issues. Indeed, The "schoolhouse gate" no longer confines a modern student's speech that is increasingly digital and utilizes forms of technology that the *Tinker* and *Fraser* Courts could not ever have

63. *Id.* at 397 ("Consistent with these principles, we hold that schools may take steps to safeguard those entrusted to their care from speech that can reasonably be regarded as encouraging illegal drug use.").

64. *See* Tinker v. Des Moines Indep. Cmty Sch. Dist., 393 U.S. 503 (1969).

65. *See supra* Part II.C.

foreseen. As a result, students are logged in constantly and share their individual and shared experiences online, with the world, by the minute through social media platforms like Facebook, Twitter and Instagram. Over the last decade, scholars have heavily criticized the utility of *Tinker* in a modern society.[66] In fact, one scholar argues that "*Tinker*, at middle age [46 years], is in the midst of a very real, very serious jurisprudential crisis and it may be at an 'existential turning point,' waning in importance in the annals of First Amendment law."[67] A new, and updated test will give judges much needed guidance, and lead to more consistent results within the doctrine. Likewise, while the most recent cases addressed in this note (*B.H.* and *J.A.*) do not expressly speak to the digital challenges that face the Court, the datedness of the current student speech doctrine still must be addressed to understand the doctrine in its entirety and to grasp the full picture of its need for reform.

B. The Doctrine Must be Structured and Uniform

The current student speech doctrine does not provide for a structured uniform test.[68] Even though student speech is "litigated more frequently than almost all other areas of free expression law,"[69] the *Tinker* standard has become unworkable because of the carving out of

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66. *See* Steven M. Puiszis, Article, *"Tinkering" With the First Amendment's Protection of Student Speech on the Internet*, 29 J. MARSHALL J. COMPUTER & INFO. L. 167 (2011); Shannon M. Raley, Note, *Tweaking Tinker: Redefining an Outdated Standard for the Internet Era*, 59 CLEV. ST. L. REV. 773 (2011); Mickey Lee Jett, *The Reach of the Schoolhouse Gate: The Fate of Tinker in the Age of Digital Social Media*, 61 CATH. U. L. REV. 895 (2014); Daniel Marcus-Toll, Note, *Tinker Gone Viral: Diverging Threshold Tests for Analyzing School Regulation of Off-Campus Digital Student Speech*, 82 FORDHAM L. REV. 3395 (2014); Clay Calvert, Tinker*'s Midlife Crisis: Tattered and Transgressed but Still Standing*, 58 AM. U. L. REV. 1167 (2009); John T. Ceglia, Comment, *The Disappearing Schoolhouse Gate: Applying Tinker in the Internet Age*, 39 PEPP. L. REV. 939 (2012).

67. Calvert, *supra* note 66 at 1168 (internal quotation marks omitted).

68. *See infra* Part IV.

69. Aaron J. Hersh, Note, *Rehabilitating Tinker: A Modest Proposal To Protect Public-School Students' First Amendment Free Expression Rights in the Digital Age*, 98 IOWA L. REV. 1309, 1311 (2013) (estimating student-expression cases in the lower courts to have been litigated at least 600 times since Tinker v. Des Moines Independent Community School District was litigated in the Supreme Court in 1969).

endless exceptions. Indeed, courts have made such a mess of the *Tinker* rule that judges, schools, and students are confused, as to what speech is actually permitted under the constitution. With courts trying to use very fact-specific inquiries to adhere to the general standard in *Tinker*, the rule has been spread so thin that it has lost much of its effectiveness.[70] Therefore, a call for a new rule seems to be the only logical way to cut through the thicket of fact-specific rules and make sense of the ever-evolving *Tinker* rule that the courts continue to try to implement. As Part IV illustrates, the opposite holdings of *B.H.* and *J.A.* demonstrate how the courts have been unable to apply the current student speech doctrine in a uniform way.

IV. A DIFFERENCE OF OPINION IN B.H. V. EASTON AREA SCHOOL DISTRICT AND J.A. V. FORT WAYNE COMMUNITY SCHOOL

A. B.H. v. Easton Area School District

1. Background and Facts of the Case

As part of its campaign, Keep A Breast "sell[s] silicone bracelets of assorted colors emblazoned with 'I ♥ boobies! (KEEP A BREAST)' and 'check y♥urself! (KEEP A BREAST).'"[71] These bracelets are meant to "educate thirteen to thirty-year-old women about breast cancer."[72] Two middle school girls (B.H. and K.M.) purchased the bracelets with their mothers when they became intrigued by the campaign and the message of the bracelets.[73] To the girls, "[t]he bracelets were more than just a new fashion trend" and they "wore their bracelets both to

70. *See id.* at 1173; Shannon M. Raley, Note, *Tweaking Tinker: Redefining an Outdated Standard for the Internet Era*, 59 CLEV. ST. L. REV. 773 (2011); Mickey Lee Jett, *The Reach of the Schoolhouse Gate: The Fate of Tinker in the Age of Digital Social Media*, 61 CATH. U. L. REV. 895 (2014) (explaining how *Tinker* has been molded and narrowed in so many ways that it no longer holds its original meaning and so many exceptions have been carved out that it is hard to see how the rule is still standing).

71. B.H. v. Easton Area Sch. Dist., 725 F.3d 293, 298 (3d. Cir. 2013).

72. *Id.*

73. *Id.* at 298–99.

commemorate friends and relatives who had suffered from breast cancer and to promote awareness among their friends."[74] The girls claimed that these bracelets were more appealing to people of their age and would create a stronger conversation about an important cause "than the more–traditional pink ribbon" that was typically used to raise awareness.[75] The girls began wearing the bracelets to school to promote the cause.[76]

Conversely, teachers wondered if administrative action should be taken against wearing the bracelets for various reasons, including the trivialization of breast cancer, the possibility of offensive responses to the bracelets, and the inviting of inappropriate touching by other students.[77] With Breast Cancer Awareness month approaching, the school banned bracelets containing the word "boobies," however, the "school still encouraged students to wear the traditional pink" for Breast Cancer Awareness purposes, explicitly stated that all references to "boobies" were banned.[78] Notwithstanding the ban, both girls continued to wear their bracelets, even after a school security guard noticed B.H. and K.M. wearing the bracelets and asked them to take the bracelets off.[79] When both B.H. and K.M. refused they were sent to speak with the principal.[80] Both girls claimed that they had rights to freedom of speech and that they should be allowed to continue to wear their bracelets.[81] As a result, both girls were suspended[82] and the school contacted B.H. and K.M.'s parents to notify them that their daughters "were being disciplined for disrespect, defiance, and disruption."[83] In response, the two girls, through their mothers, sued the school district claiming that the bracelet ban and the punishment that coincided with their refusal to comply with the ban violated their First Amendment right to free speech.[84]

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74. *Id.* at 299.

75. *Id.* (referencing the pink ribbons worn by many and used in other forms to designate a showing of support for breast cancer awareness).

76. *Id.* at 298.

77. *See* B.H. v. Easton Area Sch. Dist., 725 F.3d 293, 299 (3d. Cir. 2013).

78. *Id.*

79. *Id.* at 300.

80. *Id.*

81. *Id.*

82. B.H. v. Easton Area Sch. Dist., 725 F.3d 293, 300 (3d. Cir. 2013).

83. *Id.* (internal citations omitted).

84. *Id.*

2. Test Applied in *B.H.* and the Court's Holding

In applying its analysis, the district court noted that student speech was "a highly contextual inquiry,"[85] but that several distinct rules from other cases, specifically *Tinker* and *Fraser,* still applied.[86] These rules included: (1) under *Fraser*, schools may restrict ambiguously lewd speech only if it cannot plausibly be interpreted as commenting on a social or political matter;[87] (2) *Fraser* does not permit a school to restrict ambiguously lewd speech that can also plausibly be interpreted as commenting on a social or political issue;[88] and (3) under *Fraser*, schools may restrict plainly lewd speech regardless of whether it could plausibly be interpreted as social or political commentary.[89]

The *B.H.* court explained that under the overall framework set out by *Fraser* intermingled with other cases such as *Morse* [90] that the "i ♥ boobies!" bracelets were not lewd and vulgar speech like *Fraser.*[91] Unlike *Fraser*, premised on what the administer believed to be reasonably "lewd" and "vulgar,"[92] the *B.H.* court's holding was premised on what a "reasonable observer" would view as "lewd" or "vulgar" speech. In that light, the court believed that the bracelets at issue in *B.H.* were harmless because "a reasonable observer would plausibly interpret the bracelets as part of a national breast-cancer-awareness campaign, an undeniably important social issue."[93] However, the court stated that "[i]t remains the job of judges, nonetheless, to determine whether a reasonable observer could interpret student speech as lewd, profane, vulgar, or offensive."[94]

Next, the court compared the respondents' bracelets to the famous black armbands at issue in *Tinker.*[95] The court explained that

85. *Id.* at 309.
86. *See id.*
87. *Id.* at 308.
88. B.H. v. Easton Area Sch. Dist., 725 F.3d 293, 309 (3d. Cir. 2013).
89. *Id.* at 308–15 (explaining the three different rules that were created in *Fraser* and how the court tries to reconcile them with this particular case).
90. 551 U.S. 393 (2007).
91. *See* B.H. v. Easton Area Sch. Dist., 725 F.3d 293, 320 (3d. Cir. 2013).
92. *See id.* at 320; *see also* Bethel Sch. Dist. v. Fraser, 478 U.S. 675 (1986).
93. *B.H.*, 725 F.3d at 320.
94. *Id.* at 308.
95. *See id.* at 321.

Tinker called for regulation when there is "'a specific and significant fear of disruption, not just some remote apprehension of disturbance.'"[96] Comparatively, in *B.H.*, "[t]he bracelets had been on campus for at least two weeks without incident"[97] and the disturbance was described as "skimpier" than that of *Tinker*.[98] Because the court determined that the bracelets neither rose to the level of disturbance set out by *Tinker* nor rose to the level of vulgarity set out by *Fraser*, it concluded that the bracelets should be allowed as a form of student self-expression. Therefore, *B.H.* holds that Keep A Breast's "I ♥ boobies!" bracelets are acceptable forms of student speech that may be worn by students.[99] Despite the Third Circuit's resolution of *B.H.*, other courts have reached different results under almost identical facts.

B. J.A. v. Fort Wayne Community School

1. Background and Facts of the Case

Like *B.H*, the dispute in *J.A.* surrounded a school's administrative response to students wearing the "i ♥ boobies!" bracelets.[100] And, like *B.H.*, the administration banned students from wearing the "i ♥ boobies!" bracelet to school.[101] The ban was implemented following an incident with a male student wearing one of the bracelets and harassing a fellow student.[102] Thereafter, the school implemented the ban because that the bracelets contained terminology that "was 'offensive to women and inappropriate for school wear.'"[103] Subsequently, *J.A.*, a female student at the school, chose to wear her "i ♥ boobies!" bracelet to school and received punishment by the administration.[104] Like the students in *B.H.*, the student in *J.A.* challenged

96. *Id.*
97. *Id.*
98. *Id.*
99. *Id.* at 299.
100. *See id.* at 320; *see also* J.A. v. Fort Wayne Cmty. Sch., 2013 U.S. Dist. LEXIS 117667, *2 (N.D. Ind. Aug. 20, 2013).
101. *See J.A.*, 2013 U.S. Dist. LEXIS 117667 at *3.
102. *See id.* at *3–4.
103. *Id.* at *3 (internal citations omitted).
104. *See id.* at *5.

her discipline, suing the school district and alleging a violation of her First Amendment Right to free speech.[105]

2. Test Applied in *J.A.* and the Court's Holding

The test used to analyze the case in *J.A.* pulls from the tests from *Tinker*, *Fraser*, and *B.H.* to hold that the bracelets should be banned from the school and that it is within the administration's control to prevent disruption by not allowing students to wear the bracelets.[106] The court began with the original foundation of *Tinker*, that students are guaranteed rights to free speech under the First Amendment within the context of schools and student speech.[107] The court then narrowed the test by judging the speech under *Fraser*'s notion of "lewd" and "vulgar" speech.[108] The court then tried to distinguish *J.A.* from *B.H.* by comparing the disturbances that occurred within the schools.[109] This attempt to make the cases appear different is fairly weak because the court not only mentioned in a minor way that the bracelets caused disturbances, but strongly explained that the speech involved with the bracelets did rise to the level of "lewd" and "vulgar" speech.[110] The two opposite decisions decided in *J.A.* and *B.H.* illustrate the power of judicial discretion and that often the student speech doctrine gives rise to a judge's personal opinion of what is "lewd" and "vulgar" speech in need of regulation.

C. Juxtaposition of J.A. and B.H.

The courts disagreed in *B.H.* and *J.A.*, with the *B.H.* court deciding that the bracelets at issue did not constitute lewd, vulgar or obscene speech, and the *J.A.* court reaching the opposite result. Still, the

105. *See id.*

106. *See id.*

107. *See J.A.*, 2013 U.S. Dist. LEXIS 117667 at *2.; Tinker v. Des Moines Indep. Cnty. Sch. Dist., 393 U.S. 503 (1969).

108. *See J.A.*, 2013 U.S. Dist. LEXIS 117667 at *2; Bethel Sch. Dist. v. Fraser, 478 U.S. 675 (1986).

109. *See J.A.*, 2013 U.S. Dist. LEXIS 117667 at *2 (reasoning that there was a disturbance that caused the ban to be implemented in *J.A.* but that in *B.H.* no such disturbance had sparked the school's ban).

110. *See id.* at *12–13.

courts chose to use practically the same tests, applying *Tinker* and *Fraser* to almost identical fact patterns.[111] The only additional fact in *J.A.* that could make for the differences in opinion was, for the school's purpose for implementing the ban, a female student at the school had actually been previously harassed by a male student wearing one of "i ♥ boobies!" bracelets.[112] While it seemed that this particular male student's behavior was an isolated disruption, the female student who was actually disciplined, was only wearing the bracelet, not causing the disruption.[113] Still, this minor difference does not go to the heart of the issue and therefore should not have been a major fact of consequence in the court's decision. The two disparate holdings[114]demonstrate that lower courts are attempting to apply a rule that is too vague to apply universally.

The stark difference of opinions in *B.H.* and *J.A.* illustrate the lack of uniformity and accurate application of the current student speech doctrine. The *Tinker* rule has been "difficult to apply consistently" and "is 'malleable' and 'judgment calls about what constitutes *interference* and what constitutes *appropriate discipline*' are inherent in its application."[115] By having to rely on judicial discretion, there has been too much variance in court rulings and an overall inability to make a universal and workable standard. Rather than forming a bright line rule, the Third Circuit Court of Appeals in *B.H.* and the Federal District Court for the Northern District of Indiana in *J.A.* danced around pre-existing case law, trying to address contemporary questions through fact-specific answers from previous cases. After endless amounts of criticism speaking about the death of *Tinker* and how courts are dealing with an entire new species of students with the internet age,[116] it is puzzling that

111. *See* B.H. v. Easton Area Sch. Dist., 725 F.3d 293, 320 (3d. Cir. 2013); *J.A.*, 2013 U.S. Dist. LEXIS 117667 at *2.

112. *J.A.*, 2013 U.S. Dist. LEXIS 117667 at *2.

113. *See id.*

114. *Contrast J.A.*, 2013 U.S. Dist. LEXIS 117667 at *2 (holding that the "i ♥ boobies!" bracelets were a form of sexual, lewd, speech deserving of school regulation) *with* B.H. v. Easton Area Sch. Dist., 725 F.3d 293, 320 (3d. Cir. 2013) (rejecting that the "i ♥ boobies!" bracelets were a form of sexual, lewd speech deserving of school regulation).

115. Matthew M. Pagett, Comment, *A Tinker's Damn: Reflections on Student Speech*, 2 WAKE FOREST J. L. & POL'Y 1, 19 (2012).

116. *See supra* Part III.A.

the courts in *B.H.* and *J.A.* decided to simply reapply the same tests from *Tinker* and *Fraser*.

Moreover, in both *B.H.* and *J.A.*, the courts struggled to make sense of the tangled historical rules passed down from *Tinker*, referencing the fact that we live in changing times with changing students, but stopping short of a paradigm shift.[117] So why does the court still try to mold the rules from outdated cases like *Tinker* and *Fraser* and make the job even harder? In order to solve this ongoing issue and prevent inconsistent holdings among circuits, Part V argues that a new, uniform test would better serve the student speech doctrine.

V. A CALL FOR A NEW STRUCTURED AND UNIFORM TEST TO REPLACE THE STUDENT SPEECH DOCTRINE

A. Proposed Test

Rather than continuing to try to fit modern, relevant issues into the prism of *Tinker,* and *Fraser*, the Court should take a new uniform approach.[118] A new rule would provide clarity for lower courts and certainty in factually difficult cases. Indeed, *Tinker* is too broad and *Fraser* is too narrow, and once courts reach a fact pattern like *B.H.* or *J.A.*, it is difficult to produce a viable ruling based on existing law. As

117. Ceglia, *supra* note 66 at 941 ("As our public school administrators face school environments increasingly influenced by off–campus online activity, they have struggled to apply *Tinker* and its progeny to a school environment that the Court could never have fathomed . . . [T]he schoolhouse gate has rapidly disappeared as student activity during off–campus hours at off–campus locations can now be instantly accessed within the schoolhouse gate. Without any Supreme Court guidance, lower courts have been left to craft a patchwork of precedent, yielding inconsistent and unpredictable results."); *See also id.* (recognizing that *Tinker* and other student speech cases have made for a an endless plethora of material for courts to sift through in order to craft a rule for regulating speech which has caused great confusion).

118. What the courts have crafted recently is a "tipping point" style of analysis to see if certain speech can rise to the point of being so lewd and vulgar that it evokes the *Fraser* standard or, if on the other hand, the speech is so involved with a political or social cause that it evokes the *Tinker* standard warranting First Amendment protection.

one scholar put it, "[w]hen is a student's speech protected under the First Amendment? Is there a time when a student's speech is unequivocally protected or unprotected? Should there be a bright line rule?" [119] Thus, the idea of creating a clearly stated and direct test to answer these questions seems to be the Supreme Courts' best solution.

The proposed test would read that in order for schools to be allowed to restrict student speech: (1) The speech must be the proximate cause of a serious student disturbance; and (2) The student must have intended the speech to be disturbing.

This proposed rule builds off many of the existing tenets of *Tinker* by looking to an actual disturbance to have taken place because of the speech, but it also adds a new causation element. The causation element will make it easier for courts to analyze the speech at issue, the disruption that it caused and what the subjective state of mind the student possessed when they offered the speech at issue. Likewise, both proposed prongs allow for a "catchall" standard that would eliminate the imposition of additional exceptions to the *Tinker* rule, allowing for a universal method of analyzing student speech.

1. Prong 1: The Causation Prong

Under first prong of the proposed test, student speech must be the proximate cause of a serious student disturbance. The causation prong of the proposed test would present a two–fold analysis, requiring that: (1) the speech must have been the proximate cause of the student disturbance, and (2) the student disturbance must have been serious. In fact, the imposition of a causation requirement would have, in and of itself, solved the disparate outcomes reached by in *B.H.* and *J.A.* [120]

Applying the causation prong to the facts of *J.A.* would have resulted in a ruling for the student rather than the administration. In *J.A.*, the school–wide bracelet ban was implemented when a male student who

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119. Pagett, *supra* note 116 at 3 (classifying the leading questions that serve importance in the realm of determining how courts should analyze student speech cases and type of rule needs adopted).

120. *Contrast J.A.*, 2013 U.S. Dist. LEXIS 117667 at *2 (holding that the "i ♥ boobies!" bracelets were a form of sexual, lewd, speech deserving of school regulation) *with B.H.*, 725 F.3d at 320 (rejecting that the "i ♥ boobies!" bracelets were a form of sexual, lewd speech deserving of school regulation).

was wearing one of the bracelets harassed a female student.[121] Because of this harassment the school stated that, "the bracelet's terminology was 'offensive to women and inappropriate for school wear' making the bracelets 'lewd, vulgar, obscene, solicitous, and/or plainly offensive speech.'"[122] In applying the causation prong, it is clear that this situation does show that a serious student disturbance occurred. Student harassment is serious and should trigger the need for school administrators to intervene and discipline such behavior. However, this situation fails the proximate cause standard because the student's behavior of harassing the young girl was the proximate cause of the disturbance and not the student's speech of wearing the bracelet. Although the student may have used the bracelet as a means to harass the other student (which is not actually stated in the record), wearing the bracelet was not the proximate cause of the disturbance, the other student's behavior was.[123] Therefore, the student who was actually disciplined for wearing the bracelet (the female student) should have never been disciplined in the first place because she was innocently wearing the bracelet and her conduct did not provoke any harassment towards other students.[124] By analyzing *J.A.* through this proximate cause prong, it is clear that the case is no different from *B.H.* and that the outcome reached in *B.H.* should have been reached here if a clearly defined test, with a causation element, had been in effect.

2. Prong 2: The Intent Prong

Under the second prong of the proposed test, the student must have intended the speech to be disturbing. Students are capable of being held to a standard that recognizes their intent. Student speech can be explicit or implied and in applying the intent prong to past cases, it is clear that a deeper analysis of a student's intent would allow for uniformity and structure within the student speech doctrine.

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121. 2013 U.S. Dist. LEXIS 117667 at *3.

122. *Id.* at *3–4 (classifying the bracelets as such following the episode of harassment with the male student).

123. *See id.* at *3.

124. *See id.* at *4.

Students often explain the intent behind their chosen method of speech.[125] For example, in *Tinker*, the intent of the students was to show their disapproval of the Vietnam War.[126] Thus, the students explicitly stated they did not have the intent to cause a disturbance at school, only to display their political beliefs without the threat of punishment.[127] Similarly, intent can also be implied through the conduct and actions of the student. For example, in *Fraser*, the student clearly had some intent to cause a school disturbance.[128] The student knew that his speech would be delivered to the entire student body,[129] and faculty members informed him that his proposed speech was inappropriate.[130] Unlike *Tinker*, the student in *Fraser* was aware of the sexual nature of the speech and his intent, while not directly stated, was to present this sexually explicit speech to the entire student population for the purpose of a disturbance.

In applying the intent prong to the facts of *B.H.*, the intent of the students in *B.H.* is similar to the political activism in *Tinker* and unlike the sexual connotations in *Fraser*. In *B.H.*, the students chose to wear the "i ♥ boobies!" bracelets for the explicit purpose of promoting breast cancer awareness, a charitable and humane endeavor, not to cause a disturbance.[131] Unlike *Fraser*, the students did not intend for the bracelets to communicate a sexual connotation. Rather, the actual intent of the students themselves differentiates their conduct from what the school administration thought was an intentional disturbance. Both demonstrate show that the intent of the students has always had a large presence in the undertones of the case, but the courts have not given this

125. *See generally* Bethel Sch. Dist. v. Fraser, 478 U.S. 675 (1986); Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969); B.H. v. Easton Area Sch. Dist., 725 F.3d 293, 320 (3d. Cir. 2013) (illustrating in all of these cases that each student gave an explanation for the intent that the speech was supposed to portray and whether or not the students planned to create a disturbance).

126. *Tinker,* 393 U.S. at 504 (explaining that while much of the students' beliefs seemed to stem from their parents', the students adopted their parents viewpoints and stated their intention to come to school wearing the armbands was to show their political beliefs about the Vietnam War).

127. *See id.*

128. *See* Bethel Sch. Dist. v. Fraser, 478 U.S. 675 (1986).

129. *See Fraser*, 478 U.S. at 677.

130. *Id.* at 678.

131. *B.H.*, 725 F.3d at 299.

much weight and have focused primarily on the speech itself.[132] Thus, it is apparent that analyzing the actual intent of students can lead courts to understand the purpose of the speech at issue and whether it is within the spirit of the *Tinker* or the concerns in *Fraser*.

The intent prong will also give students a better opportunity for explanation in court. This is an important development because student speech cases almost always involve minors with the actual lawsuit filed by the parents of the student.[133] With this process, students often lose their voice and parents guide the narrative put forth to the court. An intent requirement provides for the student's perspective and not simply the perspective of the parent bringing suit. As a result, courts will be able to better determine if the student intended to use their speech to create a disturbance or if they had broader intentions that may have included notions of political, social, or charitable activism.

B. Pros and Cons of the Proposed Test

The proposed test also provides for two very substantial improvements to existing doctrine. First, it provides for uniformity and helps to eliminate much of the judicial discretion that has been applied to lower court decisions with the current student speech doctrine.[134] The proposed test also allows for a uniform analysis that is structured around familiar legal principles that judges should easily be able to apply: causation and intent. Moreover, the proposed test will also prevent judges from weighing different past cases more heavily than others leading to inconsistent results. Second, the proposed test should withstand the test of time. The proposed test is a flexible one that will be able to fit changing times.

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132. *See e.g.*, *Fraser*, 478 U.S. 675 (1986); *Tinker*, 393 U.S. 503 (1969); *B.H.*, 725 F.3d at 320.

133. *See e.g.*, *Fraser*, 478 U.S. 675 (1986); *Tinker*, 393 U.S. 503; *B.H.*, 725 F.3d at 320; J.A. v. Fort Wayne Cmty. Sch., 2013 U.S. Dist. LEXIS 117667, at *2 (N.D. Ind. Aug. 20, 2013).

134. *See generally B.H.*, 725 F.3d 293 (3d. Cir. 2013); J.A. v. Fort Wayne Cmty. Sch., 2013 U.S. Dist. LEXIS 117667 (N.D. Ind. Aug. 20, 2013) (illustrating the idea that judicial discretion played a role in the two different outcomes that resulted from these two cases sharing almost identical fact patterns).

Still, there are also two drawbacks to the proposed test that should be addressed. First, the proposed test has the opportunity for judicial misuse. By making the test uniform and capable of evolving to modern times, it will create vulnerability for under enforcement or over enforcement by judges. However, this seems to be an issue with any sort of uniform test and society must trust that judges will accurately rule to uphold constitutional values. Second, judges may have a difficult time pinpointing exactly where certain facts fall within the framework of the proposed test, and they may feel they are without a framework to lead them in the right direction due to the broad nature of the test. Overgeneralizing student speech cases is a serious issue because courts have to be able to find the middle ground between complete regulation and student freedom. This course would involve looking at the facts and the details of particular situations in order to find this middle ground and cannot allow for a rule that fails to take into account case-by-case fact patterns into its analysis.

Overall, having a test that is structured and uniform will allow for the elimination of the uncertainty that has encircled the student speech doctrine. Judges will not have to sit in their chambers deciphering what speech is derogatory or lewd in their own opinion or see if the speech rises to the limits of *Fraser* in accordance with "lewd and vulgar" speech.[135] While judges do not need someone looking over their shoulders to make sure that they are making the right decisions, they do need guidance from the Supreme Court to establish how they should be analyzing these cases and this proposed test seems to be the way to point everyone in the right direction.

VI. CONCLUSION

Finding the middle ground between a student's First Amendment right to free speech and expression with the school administration's right to regulate the conduct that takes place within its schools may not be a quick or easy task. Still, the proposed test could be a step in the right direction. Even though the Supreme Court denied certiorari in *B.H.* denying itself the chance to reform the current framework, we can only hope that the Court will take on student speech again soon. Until then,

135. 478 U.S. at 675.

schools and courts alike will be forced to "'flesh out' the First Amendment's 'boobies' boundary"[136] piecemeal on an *ad hoc* basis.

136. Aditi Mukherji, *Students Win 'I Love Boobies' Free Speech Appeal*, FIND LAW (Apr. 8, 2015, 8:30 AM), blogs.findlaw.com/law_and_life/2013/08/students-win-i-love-boobies-free-speech-appeal.html.